Ranhill Bersekutu Sdn Bhd v Safege Consulting Engineers & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–29 OF 2003
RAUS SHARIF J
3 NOVEMBER 2003

Arbitration — Arbitrator — Misconduct — Whether there were errors of law in both orders — Whether orders handed down were awards — Whether arbitrator has misconducted himself — Arbitration Act 1952 s 24(2)

The plaintiff and first defendant were consulting engineers whose professional services were engaged by the second defendant pursuant to a consulting services agreement. Based on the agreement the plaintiff and the first defendant agreed that they would be jointly and severally liable to the second defendant and further to refer any question, dispute or difference that might arise in relation to the agreement to arbitration.

During the arbitration proceedings, the plaintiff served a notice on the first defendant claiming contribution and/or indemnity in respect of the sums claimed by the second defendant. The first defendant asserted that the arbitrator lacked jurisdiction to adjudicate on the issue of contribution in the arbitration proceeding. By a court order, it was declared that the arbitrator had the jurisdiction to decide on issues of contribution and/or indemnity.

Upon receiving the order and hearing the parties' brief submissions, the arbitrator directed *inter alia* that the issue of contribution be heard after the award in favour of the second defendant and that supplementary submissions and evidence on the issue of contributions may be given at the same hearing, ie the first order. Subsequently, the plaintiff objected to the first order. Upon hearing and considering full submissions by the plaintiff, the arbitrator decided to maintain his directions on the issue of contribution in the first order. This was the second order.

The plaintiff applied to the High Court to set aside both orders pursuant to s 24(2) of the Arbitration Act 1952 on the grounds that the arbitrator misconducted himself as well as alleged errors of law appearing in both orders.

Held, dismissing the plaintiff's application:

(1) The two orders were not awards but merely directions or interlocutory rulings and they purely specified the order in which issue of contribution had to be decided in the arbitration and therefore were not susceptible to being set aside. Until the first order, the issue in the arbitration proceeding was limited to the second defendant's claim in contract and tort against the plaintiff and the first defendant. Since the issue of contribution would only arise if and after a finding of liability against the plaintiff and the first defendant, it stood to reason that the issue should be reserved until there was a finding of liability against the plaintiff and the first defendant and the extent of the liability. Furthermore, an arbitrator is the master of procedure to be followed in arbitration and he has complete and

unfettered discretion in the matter. Being procedural rulings, the court had no jurisdiction to supervise (see paras 12, 14, 15 and 16).

(2) The High Court's jurisdiction to set aside an arbitrator's award for misconduct under s 24(2) is very limited and only to be exercised sparingly, that is, as such in the event of miscarriage of justice in which there is failure to observe the rules of natural justice or an appearance of bias, partiality, illegality or dishonesty. None of these circumstances justifying a setting aside the two orders were present in this case (see para 22).

(3) The directions of the arbitrator were not contrary to the said court order. The said court order only declared that the arbitrator was vested with the jurisdiction to decide the issue of contribution between the plaintiff and the first defendant. It did not specify in what order or manner in which the issue of contribution must be decided in the arbitration (see para 23).

(4) Whilst the plaintiff alleged that the arbitrator had misconducted the proceedings and declined jurisdiction, the plaintiff had not shown that the impugned order had in any way prejudiced the plaintiff's case or caused the plaintiff any injustice (see para 28).

(5) The court's general approach to arbitrations is a hand-off attitude unless there has been something radically wrong and vicious in the proceeding (see para 29).

[**Bahasa Malaysia summary**

Plaintif and defendan pertama adalah jurutera rundingan dan perkhidmatan kepakaraan mereka diupah oleh defendan kedua berikutan perjanjian rundingan perkhidmatan. Berdasarkan perjanjian tersebut, plaintif dan defendan pertama bersetuju bahawa mereka bertanggungjawab secara bersesama dan berasingan kepada defendan kedua dan seterusnya, jika terdapat sebarang persoalan, pertikaian atau perselisihan berhubung dengan perjanjian tersebut ia akan dirujuk kepada timbangtara.

Semasa prosiding timbangtara, plaintif telah menyampaikan notis kepada defendan pertama menuntut sumbangan dan/atau tanggung rugi berhubungan dengan tuntutan oleh defendan kedua. Defendan pertama menyatakan bahawa penimbangtara tidak mempunyai bidang kuasa untuk membuat keputusan ke atas isu sumbangan. Melalui satu perintah mahkamah telah diisytiharkan bahawa penimbangtara mempunyai bidang kuasa untuk membuat keputusan ke atas isu sumbangan dan/atau tanggung rugi.

Selepas menerima perintah and mendengar hujah ringkas kedua-dua pihak, penimbangtara memberi arahan bahawa kedua isu sumbangan akan didengarkan selepas award yang memihak defendan kedua dan hujah tambahan serta keterangan berkait dengan isu sumbangan boleh dikemukakan pada pendengaran yang sama, iaitu perintah pertama. Seterusnya, plaintif membantah terhadap perintah pertama. Selepas mendengar dan mempertimbangkan hujahan penuh plaintif penimbangtara membuat keputusan untuk mengekalkan arahan beliau ke atas isu sumbangan dalam perintah pertama. Ini merupakan perintah kedua.

Plaintif memohon kepada Mahkamah Tinggi supaya kedua-dua perintah diketepikan di bawah s 24(2) Akta Timbangtara 1952 atas alasan penimbangtara telah melakukan salah laku serta terdapat kekhilafan undang-undang pada kedua-dua perintah berkenaan.

Diputuskan, menolak permohonan plaintif:

(1) Kedua-dua perintah bukan award tetapi hanya arahan atau perintah interlokutori dan ia menentukan cara isu sumbangan harus dipertimbangkan dalam timbangtara dan oleh itu tidak dapat diketepikan. Sehingga perintah pertama, isu di dalam prosiding timbangtara tersebut terhad kepada tuntutan defendan kedua dalam kontrak dan tort terhadap plaintif dan defendan pertama. Memandangkan isu sumbangan hanya akan berbangkit jika and selepas keputusan liabiliti terhadap plaintif dan defendan pertama dibuat, maka isu ini harus ditujukan sehingga terdapat keputusan keatas liabiliti tersebut. Tambahan pula, penimbangtara adalah tuan prosedur yang perlu diikut di dalam timbangtara dan beliau mempunyai budibicara yang penuh dan tidak terlepas dari belenggu di dalam perkara itu. Oleh kerana ia adalah arahan prosedur, mahkamah tidak mempunyai bidangkuasa untuk membuat arahan (lihat perenggan 12, 14, 15 dan 16).

(2) Bidang kuasa Mahkamah Tinggi untuk mengetepikan award penimbangtara untuk salah laku di bawah s 24(2) adalah sangat terhad dan harus digunakan dengan berhati-hati iaitu hanya dalan situasi salah laksana keadilan di mana terdapat kegagalan untuk mematuhi kaedah keadilan asasi atau terdapat unsur-unsur berat sebelah, kepenyalahan undang-undang dan ketidakjujuran. Tiada sebarang unsur-unsur ini yang hadir dalam kedua-dua perintah berkenaan untuk mengenepikannya (lihat perenggan 22).

(3) Arahan yang diberikan oleh penimbangtara tidak bercanggah dengan perintah mahkamah berkenaan. Perintah tersebut hanya mengisytiharkan bahawa penimbangtara tersebut diberikan bidang kuasa untuk membuat keputusan ke atas isu sumbangan di antara plaintif dan defendan pertama. Ia tidak menentukan cara isu sumbangan harus diputuskan dalam timbangtara tersebut (lihat perenggan 23).

(4) Walaupun plaintif mengatakan bahawa penimbangtara telah melakukan salah laku dalam prosiding dan enggan menerima bidang kuasa, plaintif tidak menunjukkan bahawa perintah tersebut telah memprejudiskan kes plaintif atau menyebabkan ketidakadilan terhadap plaintif (lihat perenggan 28).

(5) Pendekatan am mahkamah dalam sesuatu prosiding timbangtara adalah dengan menjauhkan diri kecuali wujudnya sesuatu yang salah dan kejam dalam prosiding tersebut (lihat perenggan 29).]

Notes

For cases on misconduct of arbitrator, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1120–1124.

For misconduct of arbitrator, see 13 *Halsbury's Laws of Malaysia*, para [220.127].

Cases referred to

Arbitration between Mohamed Ibrahim & Koshi Mohamed, Re [1963] MLJ 32 (refd)
Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn [1981] 1 All ER 289 (refd)
Chamsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd [1923] AC 480 (refd)
Dato' Samsudin bin Abu Hassan v Robert Kokshoorn [2003] 3 MLJ 331 (folld)
Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49 (folld)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (folld)
Hopper, Re [1867] Lr 2 QBD 367 (folld)
King & Another v Thomas McKenna Ltd & Anor [1991] 2 QB 480 (folld)
MCIS Insurance Bhd v Associated Cover Sdn Bhd [2001] 2 MLJ 561 (refd)
Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (folld)

Legislation referred to:

Arbitration Act 1952 ss 13(1), 21(2), 24, (1), (2)

M Nagarajah (Sherene Lee with him) (Shook Lin & Bok) for the plaintiff.
GH Khoo (LT Kua with him) (Skrine) for the first defendant.
M Pathmanathan (M Pathmanathan & Co) for the second defendant.

Raus Sharif J:

[1] By way of an originating motion in encl 1, the plaintiff applied, *inter alia*, for the following orders:

(a) that paras 1.1 to 1.1.3 of the order for directions by the arbitrator dealing with the issue of contribution of appointment of liability ('the first order') and published to the plaintiff, the first defendant and second defendant on 14 February 2003, be set aside pursuant to s 24(2) of the Arbitration Act (Revised 1972);

(b) that the further order for directions by the arbitrator made on 19 February 2003 dealing with the first order and published as para 3 therein ('the second order') to the plaintiff, the first defendant and the second on 20 February 2003 be set aside pursuant to s 24(2) of the Arbitration Act (Revised 1972).

[2] The facts leading to the plaintiff's application are as follows. The parties to this application are parties to the current arbitration proceedings which was instituted on 27 September 1999. The second defendant is the claimant in the arbitration and the plaintiff and the first defendant are the respondents. The plaintiff and the first defendant are consulting engineers, whose professional services have been engaged by the second defendant pursuant to an agreement for consulting services dated 12 October 1992. By art 1 of the agreement, the plaintiff and the first defendant agreed that they would be jointly and

severally liable to the second defendant. By art 4.07 of the agreement, the parties had agreed to refer to any question, dispute or difference that might arise in relation to the agreement to arbitration. Disputes and differences in fact did arise between the parties. The second defendant invoked art 4.07 of the agreement and referred the same to arbitration.

[3] During the arbitration proceedings, the plaintiff served a notice dated 17 September 2002 on the first defendant claiming contribution and/or indemnity in respect of the sums claimed by the second defendant, which the arbitrator may find in the second defendant's favour having regard to the first defendant's scope of responsibility under the agreement.

[4] By reason of the first defendant's assertion that the arbitrator lacks the jurisdiction to adjudicate on the issue of contribution in the arbitration proceedings, the plaintiff by way of an Originating Motion No. R1-25-121-2002 applied to the High Court for a declaration that the arbitrator was vested with the jurisdiction. By an order of the High Court made on 10 January 2003, by Abdul Hamid bin Said J, it was declared that the arbitrator had the jurisdiction to decide on the issue of contribution and/or indemnity between the plaintiff and the first defendant. The first defendant had appealed against the said order to the Court of Appeal. The appeal is still pending.

[5] As the result of the High Court Order dated 10 January 2003 and the first defendant's appeal, a meeting was fixed on 11 February 2003, for the arbitrator to give his directions on the conduct of the arbitration proceedings. At the said meeting, upon hearing and considering brief submissions from the parties, the arbitrator directed *inter alia* that the issue of contribution to be heard after an award in favour of the second defendant and that supplementary submissions and evidence on the issue of contributions may be given at the same hearing. The learned arbitrator reduced the said order into writing in a letter to the parties dated 14 January 2003 ('the first order') which, *inter alia*, reads as follows:

> 1 Pursuant to the meeting held on 11 February 2003, I hereby held as follows:
>
> 1.1 ISSUE OF CONTRIBUTION OR APPORTIONMENT OF LIABILITY
>
> 1.1.1 This issue shall be dealt with after award has been made on the claimant's claims and respondents' counterclaim.
>
> 1.1.2 Supplementary submissions shall be made by the respondents at a date to be fixed after the above mentioned awards. Such supplementary submissions shall be limited only to the issue of contribution/apportionment of liability.
>
> 1.1.3 Respondents may recall any witness or call new witnesses to give evidence on this issue.

[6] At the commencement of the arbitration on 19 February 2003, the plaintiff objected to the first order made by the arbitrator for holding that the arbitration proceedings to be split into two different and separate proceedings. Upon hearing and considering full submissions by the plaintiff, the arbitrator decided to maintain his directions on the issue of contribution in the first order. This was confirmed in writing in a letter dated 20 February 2003 to the parties which, *inter alia*, reads as follows:

3 ORDER FOR DIRECTIONS DATED 14 FEBRUARY 2003

Order for directions of 14 February 2003 para 1.1 on Issue of Contribution or Apportionment of Liability remain unchanged.

[7] Thus, it is the plaintiff's contention that the arbitrator has misconducted himself in making and publishing the first and second order and seeking to set aside both these orders pursuant to s 24(2) of the Act. The grounds for the plaintiff's contention are as follows:

(a) the arbitrator has misconducted himself in that he has declined his jurisdiction as per order of the High Court dated 10 January 2003 which declared that the arbitrator is vested with the jurisdiction to adjudicate on the issue of contribution or apportionment in the arbitration procedure;

(b) there are errors of law appearing on the face of the first order and second order resulting in a substantial miscarriage of justice to the plaintiff, by the act of the arbitrator in holding that the arbitration proceedings be split into two different and separate proceedings with the express intention to deliver two distinct and separate awards in the present arbitration proceedings;

(c) the arbitrator has misconducted himself in that by isolating the contribution issue from being adjudicated in the present arbitration, he has in fact defined himself of the jurisdiction to adjudicate on the contribution issue whereupon his jurisdiction would have ceased upon delivery of the final award *vis-à-vis* the second defendant's claim against the plaintiff and the first defendant in the arbitration proceedings;

(d) the arbitrator has misconducted himself by publishing the first order and the second order in that he has proceeded illegally and without jurisdiction to isolate the contribution issue from being adjudicated in the arbitration proceedings and to prevent the contribution issue from being heard before the Final Award *vis-à-vis* the second defendant's claim against the plaintiff and the first defendant in the arbitration proceedings; and

(e) the arbitrator, in relation to the first order has misconducted himself and failed to observe the principle of natural justice and fairness in that he has proceeded illegally by misjudging on the contribution issue in the first order without inviting any further and proper submission and without acting judicially.

[8] The first defendant, as well as the second defendant in opposing the plaintiff's application states their reasons *inter alia* as follows:

(a) the first order and second order were not awards and therefore, fall outside the ambit and purview of s 24(2) of the Act;

(b) the first order and the second order were merely interlocutory rulings made for procedural convenience which is within the arbitrator's sole discretion and prerogative;

(c) the first order and second order were not contrary to the court order dated 10 January 2003;

(d) by making the said orders, the arbitrator has neither declined jurisdiction nor misconducted the arbitration proceedings;

(e) even if the first order and second order are interim awards they should not be set aside because:

(i) there is no misconduct by the arbitrator; **A**

(ii) there is no error of law on the face of them; and

(iii) they were decisions by the arbitrator on a point of law specially referred to him.

FINDINGS **B**

(a) Were the two orders 'awards'?

[9] To me, the first issue for this court to determine is whether or not the two orders constitute awards under s 24 of the Act. The word 'award' is not defined in the Act. Nevertheless, it has been judicially considered. In *Re arbitration between Mohamed Ibrahim & Koshi Mohamed* [1963] MLJ 32, the Court of Appeal adopted the following test in determining what constituted an award: **C**

> 'Award' is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend upon whether the order in question amounts to a decision. The principle is … 'any forms of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary'. **D**

[10] The above case was followed by KC Vohrah J in *MCIS Insurance Bhd v Associated Cover Sdn Bhd* [2001] 2 MLJ 561 at p 567, who said as follows:

> The expression 'interim award' appearing in section 15 is not defined anywhere in the Act. Nor is the expression 'award' defined. Whatever the expression used, whether 'award', 'final award', 'interim award' or 'temporary award' in the context of our law on arbitration, what is important to ascertain is whether it amounts to a decision on the questions referred for determination by the arbitrator; any form of words amounting to a decision of the questions referred to will be good as an award. **E**

[11] The plaintiff submits that the two orders clearly and indisputably constitute 'awards' within the ambit of the above test. According to the plaintiff, the said 'awards' made were final in its terms and in so far as it relates to the issue of how the arbitrator proposes to finally adjudicate on the issue of contribution. **F**

[12] With respect, I am unable to agree. To me, the two orders are not awards but merely directions or interlocutory rulings. The two orders merely specify the order in which issue of contribution has to be decided in the arbitration and therefore, are not susceptible to being set aside. In the recent Court of Appeal case of *Dato' Samsudin bin Abu Hassan v Robert Kokshoorn* [2003] 3 MLJ 331, the Court of Appeal approved and followed the principle established in the English Court of Appeal case of *King & Another v Thomas McKenna Ltd & Anor* [1991] 2 QB 480 and held that except for the power to remove an arbitrator for bias under s 24(1) any intervention by the court can only occur after an award has been made. The Court of Appeal held that the challenge to a ruling by the arbitrator excluding certain documents was not an award or interim award but merely an interlocutory ruling which may only be challenged when the final award is handed down. Similarly, in the present case the two orders are not awards but interlocutory ruling, which may be open to challenge when the final award is handed down. **G** **H** **I**

[13] The arbitrator's powers to make such directions is implied in s 13(1) of the Act which provides as follows:

> … every arbitration agreement shall … be deemed to contain a provision that the parties to the reference, … shall … *do all other things which*, during the proceedings on the reference, the *arbitrator … may require*. (Emphasis added).

[14] Thus, in the present case, until the first order, the issue in the arbitration proceeding was limited to the second defendant's claim in contract and tort against the plaintiff and the first defendant. However, with the expanded scope perhaps to the issue of contribution between the plaintiff and the first defendant, it was incumbent on the arbitrator to give his directions on the procedural aspects of how the new issue would be dealt with. Since the issue of contribution will only arise if and after a finding of liability against the plaintiff and the first defendant, I am of the view that it stands to reason that the issue should be reserved until there is a finding of liability against the plaintiff and the first defendant and the extent of the liability. Thus, only after liability and quantum are determined can the issue of contribution be determined. To me, the procedure adopted will allow the arbitrator to better and sharply focus first on the primary issue of whether or not the plaintiff and first defendant are liable to the second defendant.

[15] It is settled law that an arbitrator is the master of procedure to be followed in an arbitration and he has complete and unfettered discretion in the matter. The House of Lords in the case of *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 (HL) held that, at p 301:

> … By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular procedural rules, the parties make the arbitrator the master of the procedure to be followed in the arbitration … he has complete discretion to determine how the arbitration is to be conducted from the time of his appointment to the time of his award, so long as the procedure he adopts does not offend the rule of natural justice.

[16] Thus, to me the two orders were procedural rulings and that the arbitrator has full control. Being procedural rulings, this court has no jurisdiction to supervise. The Court of Appeal in *Dato' Samsudin* decided that at pp338–339:

> With the exception of an application to remove an arbitrator pursuant to s 24 of the Act, the Court has no power to supervise arbitration or review interlocutory decisions of an arbitration or order that the arbitrator should reconsider a pre-award ruling.

[17] At p 8 of the case, Abdul Hamid Mohamad JCA (now FCJ) in dealing with the arbitrator's ruling on admissibility of documents held as follows at p 339:

> … to allow such a ruling to be referred to court and remitted back to the arbitrator under section 23 of the Act would slow down arbitration proceedings and defeat the whole purpose of arbitration. In an arbitration proceeding, as in a trial, an arbitrator or a judge would have to make numerous rulings along the way regarding admissibility of evidence, documentary or otherwise, whether a question may be

allowed to be asked or not and so on. To allow every such ruling to be referred to court and remitted back to the arbitrator would seriously delay the proceedings before the arbitrator, what more, as in this case, where the decision of the High Court is appealed further and where there are a number of such applications and further appeals. It would also increase costs.

[18] The same principle is applicable in the present case. In fact, the two orders as directed by the arbitrator, that the issue of contribution was to be heard after the second defendant's claim against the plaintiff and the plaintiff would save time and cost for all parties. This is because only if the arbitrator delivered an award in favour of the second defendant would it be necessary to hear the issue of contribution.

(b) Misconduct

[19] Even if the first and second orders are not procedural directions but awards as contended by the applicant, I am of the view that there are no grounds for setting them aside. This court derives its statutory jurisdiction to set aside arbitral awards from s 24(2) of the Act which reads as follows:

> Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

[20] Raja Azlan Shah J (now his Majesty the Sultan of Perak) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211 set out what constitutes arbitrator's misconducts:

> … misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes irregularity of action, which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated … . … the plaintiff's complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[21] The above passage has been cited with approval by the Court of Appeal in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 and *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49. Gopal Sri Ram JCA at p 489 in *Hartela Contractors* held that the jurisdiction to set aside an arbitrator's award whether at common law or under stature is one that should be exercised with great care and with proper sense of responsibility. In *Future Heritage*, Richard Malanjum JCA in considering s 21(2) quoted Hashim Yeop Sani J, in *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105 at p 106:

> The language of s 24(2) would seem to be rather narrow and limited. In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty or bias is shown.

[22] Thus, in essence, the High Court's jurisdiction to set aside an arbitrator's award for misconduct under s 24(2) is very limited and only to be exercised sparingly, that is, as such in the event of miscarriage of justice in which there is failure to observe the rules of natural justice or an appearance of bias, partiality, illegality or dishonesty. None of these circumstances justifying the setting aside of the two orders are present in this case.

(c) Refusal to be bound by the court order dated 10 January 2003

[23] It was submitted by the plaintiff that by splitting the current arbitration proceedings into two and by isolating the contribution issue from being adjudicated in the current arbitration, the arbitrator has had deliberately refused to be bound by the court order dated 10 January 2003 and had acted in a manner which directly contravened the operation of the said court order. With respect, I am of the view that the directions of the arbitrator were not contrary to the said court order. The said court order only declared that the arbitrator was vested with the jurisdiction to decide the issue of contribution between the plaintiff and the first defendant. It does not specify in what order or manner in which the issue of contribution must be decided in the arbitration.

(d) Errors of law on the face of the two orders

[24] The plaintiff alleges that there are errors of law appearing on the face of the first and second order resulting in substantiated miscarriage of justice by the arbitrator by holding two separate proceedings and delivering two separate awards. But to me, there are no errors of law on the face of the orders. The Court of Appeal in *Future Heritage* dealt in detail of the common law jurisdiction to set aside awards on error of law on the face of award. The Court of Appeal referred to *Halsbury's Laws of England* (4th Ed) para 623 which states:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, the error of law on the face of the award, must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

[25] At p 56 (para D) of *Future Heritage*, the Court of Appeal held that:

> … the common law as a very limited exception, grudgingly allowed a court to intervene and set aside an award on the face of which there appeared an error of law.

[26] At the same page, the court also held that the breadth of this limited common law jurisdiction is as explained by Lord Dunedin in *Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480 at p 487:

> An error in law on the face of the award means, … that you can find in the award … some legal proposition which is the basis of the award and which you can then

say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is and then going to the contract on which the parties' rights depend to see if that contention is sound.

[27] The plaintiff alleges that there are errors of law appearing on the face of the two orders resulting in miscarriage of justice by the arbitrator in holding two separate proceedings and delivering two awards.

[28] With respect, I am unable to agree. Whilst the plaintiff alleges that the arbitrator has misconducted the proceedings and declined jurisdiction, the plaintiff has not shown that the impugned order has in any way prejudiced the plaintiff's case or caused the plaintiff any injustice. Save for barely alleging at para 20 of encl 2 that the orders result in a substantial miscarriage of justice to the plaintiff, the plaintiff has not demonstrated how this can be so.

CONCLUSION

[29] It is well settled that the court's general approach to arbitrations is a 'hand off attitude unless there has been something radically wrong and vicious in the proceeding' (Per Cockburn CJ in *Re Hopper* [1867] Lr 2 QBD 367). This principle has been adopted and affirmed by the Malaysian courts, that the arbitrator has, in general, a discretion as to the manner in which the arbitration is to be conducted. The court will not review the arbitrator's discretion, provided he acts within his authority and according to the principle of justice and behaves fairly to each party. On the facts of this case, and for the aforesaid reasons, I am restrained from exercising my discretion to grant the orders sought by the plaintiff as per encl 1. Accordingly, the plaintiff's application is dismissed with costs.

Application dismissed with costs.

Reported by Jeyanthi Mala